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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation	)	MM Docket No. 92-266
	)	
Leased Commercial Access	)	CS Docket No. 96-60

REPLY COMMENTS

ADELPHIA COMMUNICATIONS CORPORATION
CENTURY COMMUNICATIONS CORPORATION
FALCON HOLDING GROUP, L.P.
INSIGHT COMMUNICATIONS, INC.
SUBURBAN CABLE TV CO., INC.

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Dated: May 31, 1996

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SUMMARY

In the initial round of comments, Commentors took the position that the Commission's decision to revisit its leased channel rate formula is not timely and rests on a faulty policy foundation. The NPRM's conclusion that the paucity of leased channel use is because the rates charged for leased channels are too high is an over-simplified analysis. Congress' goal of achieving a diversity of programming sources is being realized in an explosive fashion. As for leased channels, it is the economics of programming which is the chief barrier to entry. Programmers with attractive product get access to cable systems. A programmer who has to pay to attain access to a cable system is probably not engaged in an economically viable activity. Commentors pointed out that lowering lease rates in an attempt to stimulate leasing activity may cause a short-term flurry of leased channel use, but at the price of economic harm to the cable operator in contravention of Section 612 of the Communications Act.

Comments filed by certain programmers, low powered television station licensees and non-profit organizations all struck the same theme, i.e., that the NPRM was going in the right direction by making leased access channels available at lower rates. Many of the commentors even critiqued the Commission's proposed formula, suggesting modifications which would drop the rates even further. Commentors remind the Commission that although the use of leased channels is one of the goals of Section 612, that use must be at a rate which is compensatory to the cable operator. The proposed opportunity cost formula, particularly as it would be adjusted pursuant to the suggestions of the programmer comments, would be no more than a give-away at far less than compensatory rates. As the NPRM itself stated,

leased access programmers should not be subsidized by cable operators. What many of the programmers seem to want, particularly the low-power television licensees, is a must-carry surrogate at subsidized rates. Any movement in this direction by the Commission will contradict Section 612's admonition to set rates "sufficient to assure that [leased channel] use will not adversely affect the operation, financial condition, or market development of the cable system." Moreover, rock-bottom rates which are demonstrably noncompensatory also implicate the "takings" clause of the Fifth Amendment to the Constitution.

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REPLY COMMENTS

Adelphia Communications Corporation, Century Communications Corp., Falcon Holding Group, L.P., Insight Communications, Inc., and Suburban Cable TV Co., Inc. (hereinafter "Commentors") hereby submit their reply comments in the captioned rulemaking.[1] Each of the Commentors owns and operates cable television systems and therefore has a vital interest in the outcome of this proceeding.

I. THE PROPOSED RATE FORMULA FAILS TO REASONABLY COMPENSATE THE CABLE OPERATOR, THEREBY CONTRADICTING CONGRESSIONAL INTENT AND VIOLATING THE CONSTITUTION.

A. Economic Justification

The NPRM requested comment on the Commission's economic justification for its proposed rate formula for leased access channels. The current highest implicit fee formula was adopted by the Commission in 1993 to approximate the revenue which the cable operator

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[1] Further Notice of Proposed Rulemaking in CS Docket No. 96-60, FCC 96-122 (March 29, 1996) (hereinafter "NPRM").

would have derived if it could program the channel being leased. The NPRM criticized this formula because it is allegedly not a good approximation of the costs to a cable operator of leasing a channel. The proposed replacement formula is said to be more exact, measuring as it does the net lost opportunity costs of leasing a channel. However, as Commentors pointed out in their comments, this formula suffers from at least as many deficiencies as the current formula. Not only are the allowed quantifiable lost opportunity costs measured in a way which results in undercompensation to the cable operator, but also, since many of the identifiable lost opportunity costs cannot be quantified, the proposed formula is grossly noncompensatory to the cable operator. Commentors showed how dramatically the leased channel rates would drop under the new formula.

As expected, several programmer commentors agreed with the NPRM's tentative proposal that the maximum rate should be based on the cable operator's opportunity costs plus a reasonable profit.[2] Indeed, many of these commentors made suggestions which would further lower the rates produced by the formula. However, Commentors continue to strongly believe that the NPRM's construction of leased access rates is not reasonable. The NPRM specifically states that "the cost formula is not intended to guarantee that all operating costs will be fully recovered."[3] In contrast to those in support of such a pricing scheme, Commentors believe that Congress clearly mandated that "the price, terms, and conditions" of lessee use must be at least "sufficient to assure that such use will not adversely affect the

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[2]See, e.g. Comments of Adirondack Television Corp., at 2.

[3]NPRM, at ¶ 67.

operation, financial condition, or market development of the cable system."[4] The proposed formula requires cable operators to subsidize lessees because cable operators would not even be fully compensated for their costs, much less receive competitive market prices. Since cable operators must fill all of their set-aside channels before a marketplace rate structure takes effect, the formula must at least compensate the cable operator for its costs. The proposed formula would subsidize the use of leased access channels by mandating that the cable operator charge a below-cost rate.[5]

Comments filed by several licensees of low power television stations (LPTV) suggest that the Commission arbitrarily lower rates by a set amount or introduce a flat rate for all leased access channels.[6] Commentors believe that such a system bears even less of a relationship to the reasonable rate of reimbursement a cable operator must receive pursuant to Section 612(c)(4)(i) than the proposed formula.[7]

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[4]Communications Act of 1934, as amended, ("Communications Act") § 612(c)(1), 47 U.S.C. §532(c)(1).

[5]Contra NPRM, at ¶ 68 ("We believe the proposed cost/market rate formula represents a pricing scheme that would promote leased access without giving programmers a subsidy").

[6]Comments of The Vacation Channel, Inc., at 3 (suggests that all cable companies charge LPTV broadcasters a flat rate per subscriber, per month for the lease of a channel); comments of Viking Communications, Inc., at 1; comments of WZBN TV-25 (W25AW), at 3 (arguing for a maximum rate formula of no more than $.05 per subscriber per month for a full channel; makes no note of how much such a channel costs the cable operator); comments of Mark Kliem, at 4 (suggests a set leased access range of $50-$75/hour as a rebuttable presumption).

[7]Communications Act, §612(c)(1)(4)(A), 47 U.S.C. § 532(c)(1)(4)(A) (stating that the Commission has the authority to set *maximum reasonable* rates).

Although some LPTV and independent programmers suggest that economic barriers to entry create a problem for the Commission in meeting Congress' goal of diversity, the proliferation of new programming channels contradicts their assertions. Diversity is being met by the marketplace; the marketplace is succeeding in providing a huge variety of new channels.[8] Numerous new programming networks are launched each year and many more are now in development. The Commission does not need to lower lease rates to achieve programming diversity.

The assertion that cable operators are refusing attractive, diverse programmers is not only unfounded but also illogical. Where they perceive demand, cable operators will put new programming on their systems. Cable operators benefit from adding diverse, popular cable channels because more individuals will want to subscribe. As Commentors showed, if a programmer creates attractive programming, the cable operator will pay for the programming or perhaps agree to carry the programming at no cost for a trial period.[9] Cable operators compete with other sources of video programming and, therefore, have an incentive to carry diverse programming which will improve the quality and attractiveness of their cable system. The claims made by LPTVs and unaffiliated programmers that they cannot pay anything approximating a market rate to have their programming carried on the cable system may be true, but if a programming network is so unattractive that a programmer has to lease a channel to get it on a cable system, the question arises as to

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[8]See, e.g., Broadcasting & Cable, April 29, 1996, at 61 ("nearly 100 new cable networks").

[9]See, e.g., Comments of The Vacation Channel, at 2 (two cable companies carry The Vacation Channel at no charge).

whether the programmer is simply producing an unwanted product. Moreover, the programmers' poverty claims cannot be solved by making cable operators virtually donate channel space. Commentors again remind the Commission that it has stated that it does not intend to give programmers a subsidy.[10]

Some commentors suggest that cable operators do not accept lessees because cable operators have a financial interest in affiliated sources of programming;[11] such fears are unfounded. Valuevision argues for a broad definition of affiliate which would include any financial or business relationships between a cable operator and a cable programmer that result in the potential ability of the cable operator to control or influence the programmer's business affairs.[12] In implementing the 1992 Cable Act, the Commission limited the percentage of affiliated programming a cable operator could place on its cable system.[13] This guarantees the presence of unaffiliated programmers on the majority of a cable system's channels. Commentors note that even the Commission found that "the most vertically integrated cable operators" were not "approaching the current 40 percent channel occupancy

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[10]NPRM, at ¶ 68.

[11]See, e.g. Comments of Hispanic Information and Telecommunications Network, Inc., (hereinafter "HITN"), at 8,11 (argues that cable systems have discriminated against unaffiliated programming sources in favor of programming in which the operator has a financial and/or ownership interest).

[12]Comments of Valuevision International, Inc, at 9.

[13]47 C.F.R. § 76.504(a) (" . . . no cable operator shall devote more than 40 percent of its activated channels to the carriage of national video programming services owned by the cable operator or in which the cable operator has an attributable interest.")

limit for affiliated programming."[14] Moreover, Commentors believe that a broad reading of affiliate is not consistent with the core purpose of Section 612 to promote competition in the delivery of diverse sources of video programming because a sweeping definition of affiliate would decrease the field of possible lessees. In any event, Commentors question whether this is even a proper issue in this rulemaking proceeding.

Finally, requiring a cable operator to lease channels at less than compensatory rates violates the U.S. Constitution. Under the proposed pricing formula, cable operators will not be paid a reasonable compensation for the value of their channels. Requiring cable operators to offer access to their channels at a price below their costs, much less below market value, deprives cable operators of their property without due compensation, and implicates takings considerations under the Fifth Amendment to the Constitution.[15] The current highest implicit fee formula may be below market; the proposed formula most certainly is. Congress did not intend for the leased commercial access rules to effect an unconstitutional taking of a cable operator's property.

Assuming arguendo that the Commission could resolve the Fifth Amendment taking concerns associated with forcing a cable operator to lease channels at below cost, the proposed pricing scheme still violates congressional intent. Section 612(c)(1) specifically states that lease rates shall "not adversely affect the operation, financial condition, or market development of the cable system." Commentors fully agree with the Commission's

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[14] Memorandum Opinion and Order on Reconsideration of the Second Report and Order in MM Docket No. 92-264, 10 FCC Rcd 7364, ¶¶ 16, 34 (1995).

[15] See, Duquesne Light Co. v. Barash, 488 U.S. 299, 308 (1989).

interpretation of Section 612 that programmers should not be given a subsidy to use leased channels.[16] Under Section 612(c)(1), lessees have no right to attain access on the backs of cable operators. The issue is not whether a rate is subjectively affordable to a particular lessee; the issue is whether the rate reasonably reimburses the cable operator. However, many of the lessees' comments clearly suggest the former.[17] And the proposed rate formula seems to give them just what they want: lower,[18] preferential rates without reasonably reimbursing the cable operator. As the Commission acknowledged, subscribers and cable operators should not have to subsidize the rate that lessees pay; yet, many of the comments by potential lessees appeal to the Commission to adopt a policy which would serve as a must-carry substitute with subsidies.[19]

B. Designating Channels

A few Commentors go so far as to say that lessees should have the right to be carried on cable with virtually no opportunity cost reimbursement to the cable operator.[20] For

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[16]NPRM, at ¶ 67.

[17]Comments of Beach TV Properties, Inc., at 1-2; comments of The Bruno Goodworth Network, Inc, at 5 ("LPTV stations and local LAPS should receive a 50% discount on lease access rates because of the extremely high production costs associated with this programming").

[18]See, Comments of Adirondack Television Corp, at 2 ("We presume that the FCC's statement in the FNPRM that its proposal 'is not for the purpose of lowering leased access rate' is so phrased in deference to the cable carriers").

[19]Many of the LPTV commentors continue to argue for a must-carry type right. See, e.g., Comments of Erwin Scala Broadcasting Corp., at 1-4. Commentors point out that there is no must-carry right for LPTVs and Section 612 should not be interpreted as a de facto must-carry requirement.

[20]Comments of Visual Media Productions, Inc., at 5.

instance, some commentors suggest that bumped channel opportunity costs should not be reflected in the rate calculations.[21] Commentors believe this is a purposeful misreading of Section 612 which specifically states that the reimbursement of cable operators should not adversely affect the financial condition of the cable system.[22]

Commentors also disagree with comments suggesting that a cable operator should designate the lowest cost channels on its system. For instance, Visual Media Productions suggests that "if the operator should have 5 set-aside channels, then the average of the lowest cost 5 channels on its system should be used to compute rates."[23] Such a methodology would further undercompensate cable operators for the lost opportunity cost of their channels. These commentors want to occupy the penthouse and pay rent on the basement.

C. Net Opportunity Costs

1. Lost Advertising Revenues

The first component of the Commission's proposed net opportunity cost formula is lost advertising revenues. The NPRM proposes that the operator should be entitled to recover from the leased access programmer an amount equal to the advertising revenue derived from the current programming. Some commentors suggest that the cable operators are reasonably compensated without any reimbursement for lost advertising.[24] Commentors believe that such a position is wholly inconsistent with the notion of reasonable compensation

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[21]Id.

[22]Communications Act, § 612(c)(1), 47 U.S.C. § 532(c)(1).

[23]Comments of Visual Media Productions, at 5.

[24]Id. at 5.

because advertising revenues are an important component of the cable operator's opportunity cost.

2. Lost Commissions

The second component of the Commission's net opportunity costs is lost commissions. Similar to lost advertising revenue criticisms, some commentors believe that cable operators are reasonably compensated without lost commissions.[25] If cable operators are going to be compensated for foregone opportunity costs, then lost commissions must be included. Commissions are usually derived from shopping channels where the operator receives a percentage of the programmer's revenues from the sale of goods. While Commentors do not believe the proposed formula will fully compensate cable operators for lost commissions, Commentors strongly believe that lost commissions must be included.

3. Rate Reductions

The NPRM states that another opportunity cost would be any reduction in the rate the operator charges the subscriber for the tier as a result of the substitution of the leased access programming for the bumped non-leased access programmer. Several commentors suggest that the leased access channel rate should be based on dark or least-profitable channels.[26] Commentors believe that such a system would even more grossly undercompensate a cable operator than the Commission's proposed formula. Since any dark channel which is

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[25] See, e.g., Comments of Visual Media Productions, Inc., at 5.

[26] See, Comments of The Game Show Network, at 8. ("Cable operators should be allowed to designate for leased access status only those channels that rank among the lowest third in terms of per channel opportunity costs."); comments of Community Broadcasters Association, at 3; comments of Asiavision, Inc, at 1.

designated as one of the set-aside channels can have no quantifiable opportunity costs, the NPRM proposes to allow cable operators to approximate the opportunity costs of a dark channel by assigning it the per-channel opportunity cost of the program channels with the lowest positive value. Such channels would not include required channels such as must-carry, PEG, or any leased access channels already in use. Commentors wish to point out to the Commission that the lowest positive value opportunity cost channels will have a value of at or near zero. This system would put the cable operator in an untenable position. If it designates dark channels for its leased access set-aside in order to avoid bumping existing programmers, the charge it may be able to impose for leased channels will be reduced to near zero. The effect of the commentors' suggestion would be to mandate such rates no matter which channels a cable operator designated.

Moreover, the programming channels with the lowest positive opportunity cost values are either going to be channels with a high public interest quotient or the very type of marginal programming service which the leased channel rules are designed to serve. Therefore, any attempt to equate these channels with dark channels designated for leased access is an invalid concept on both economic and programming grounds. It is, therefore, wrong to assume that the channels with the lowest opportunity costs are the most likely to be bumped and, therefore, that they are the best surrogate for dark channels.

D. Averaging the Per Channel Costs for All Designated Channels

Some commentors argue that benchmark rates based on the costs of average cable systems would ease the administrative burden for the Commission;[27] however, such a system would not adequately compensate most cable operators for the costs of leasing on their particular cable system. Even if the proposed formula accurately approximated the recovery of the costs to a particular cable operator of leasing the average channel, the cable operator will not recover these costs if a channel with the highest positive opportunity costs is leased since the cable operator can only charge the average. This would be even more true if costs were averaged over multiple cable systems. Commentors again wish to point out how low these figures are likely to be. Since cable operators are unlikely to designate premium or shopping channels for lease, and regular programming channels with high opportunity costs are too popular to designate, low cost and dark channels usually will be designated. This practice will not produce reasonable rates for the cable operator and will require the cable operator to subsidize the lessee even without cost averaging.

The NPRM states that the cable operator would have to charge the same rate to each leased channel lessee. However, the Cable Act does not preclude a cable operator from discriminating in its leased channel rates so long as the maximum rates calculated under the applicable formula are not exceeded. Thus, Section 612(c)(2) states that a cable operator "may consider [program] content to the minimum extent necessary to establish a reasonable

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[27]But see Comments of Video Information Providers for Non-discriminatory Access (hereinafter VIPNA), at 6 (Note: VIPNA's name is not on the cover of its comments. VIPNA argues that the Commission should use benchmark rates to simplify the formula and ease the dispute resolution burden.).

price for the commercial use of designated channel capacity by an unaffiliated person." Commentors believe that this statement means that the cable operator can take into consideration the mix of programming on its system in deciding what rate it will charge. Thus, the cable operator may wish to charge the highest possible rate to someone proposing the fourth golf channel on its system but charge a much lower rate for the first lacrosse channel. Using the NPRM's proposed opportunity cost formula as an example, the cable operator should be permitted to charge as much as the rate produced by the set-aside channel with the highest opportunity cost. This rate would then be averaged with the lower rates charged for other leased channels.

E. Market Rate as the Maximum Rate

The NPRM proposes to allow its formula rate to be replaced by the marketplace once a cable operator's set-aside has been filled by channel lessees. Several commentors argued against a market approach because they believe it contravenes the mandate for reasonable rates.[28] However, Congress stated that the Commission could determine the "maximum reasonable rate" and the prices of leased access use should not adversely affect the cable system.[29] The Commission should presume that a reasonable rate is the market rate since the market is a continually updated and accurate measure of a channel's worth. Furthermore, Commentors believe that a market rate will ensure that shows with larger numbers of viewers get carried and, thus, subscribers have access to the programs they prefer.

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[28]See, e.g., Comments of Visual Media Productions, at 6.

[29]Communications Act, § 612(c)(1)(4), 47 U.S.C. §532(c)(1)(4).

F. Transition Period

The NPRM inquired whether the proposed cost formula should be phased in for those leased access requests that can only be accommodated by bumping existing non-leased access programming. Such a transition plan would move the leased access rate from the highest implicit fee formula level to the NPRM's proposed new cost formula level over a period of years. Some commentors suggest that the cable operator should not be compensated for having to bump a network that occupies a set-aside channel.[30] On the contrary, Commentors believe that contract provisions may lead cable operators to designate channels for lease based not on which service could be bumped with the least harm to a tier's attractiveness but instead on the penalties or lack thereof for terminating a programming service. Such a result would be totally inconsistent with Congress' overriding goal of promoting program diversity. Allowing the cable operator to charge the highest implicit fee rate in the case of a bumped programmer would at least ameliorate this problem.

II. OTHER ISSUES

A. Part-Time Rates

In the NPRM, the Commission has decided to continue to require proration of the maximum rate with time-of-day pricing for part-time leased channel use. The NPRM asks whether under a new full-time rate formula, there might be a different method for calculating the maximum reasonable rate for part-time use. Commentors agree with The Vacation

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[30]See Comments of VIPNA, at 7 (lessees should not be required to pay for bumping networks that the operators added or whose contracts were re-negotiated after 1984).

Channel that cable operators should not be obligated to offer part-time leases.[31] Commentors submit that the entire concept of part-time use is questionable. Section 612 of the Act does not even mention part-time leasing. Thus, it may be that the requirement even to make a channel available for one or more part-time lessees exceeds the Commission's authority.

However, if part-time leasing is legal, even the highest implicit fee formula, when pro-rated for part-time usage, does not compensate the cable operator unless the channel being used for part-time leasing is fully occupied. Thus, whatever formula the Commission adopts to determine a full-time lease rate, prorating of this rate is noncompensatory. The NPRM obviously senses a problem in this regard in its proposal to require the guarantee of a minimum time increment of eight hours within a 24-hour period as a precondition for requiring an operator to open up an additional channel for part-time leased access. Even this proposal falls short of what is needed. Such a concept should be applied not only to the opening of an additional channel but also to the opening of the first part-time leased access channel. This proposal would not cure the economic injury which part-time use causes to a cable operator, but it would begin to address the issue. In addition, Commentors recognize the validity of Access Television Network's comments that "a genuine outlet already exists for long-form advertisers and infomercials, and thus CLA rates or rules that would promote

[31]Comments of The Vacation Channel, at 3 ("Cable operators should not be obligated to offer part-time leases. The leases pose an inappropriate burden on cable operators.").

increased channel time for these entities is unnecessary and would be contrary to both Congressional intent and the public interest."[32]

B. Preferential Access

The NPRM again raises the issue of whether it should establish a special rate category for not-for-profit programmers and whether cable operators should be required to reserve some of their leased access channel set-aside for such programmers. Obviously, several non-profit programmers are in favor of a possible set-aside.[33] Commentors agree with The Game Show Network suggestion that such proposals are "an attempt by not-for-profit programmers to get a subsidy for themselves."[34] As the Game Show Network points out,[35] rates requiring subsidization directly contradict Congressional intent in Section 612(c)(1) that leased access rates must be "at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable

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[32]Comments of Access Television Network, at 1.

[33]See, e.g., Comments of Center for Media Education, Alliance for Community Media, Association of Independent Video and Filmmakers, Consumer Federation of America, National Association of Artists' Organizations, United States Catholic Conference, at 10 (arguing for reserved channel capacity for non-profit programmers); comments of the Association of America's Public Television Stations and The Public Broadcasting Service, at 2 (arguing for preferential rates and channel reservation); comments of HITN, at 22 (argues that non-profit entities, specifically those which also qualify as serving minority and/or educations interests, should be entitled to at least 33 percent of the total number of set-aside channels); comments of Vernon Watson, at 1-2; comments of WBOB TV-12, at 1-3 and Recommendation 1 ("Minority LPTV's should be given special considerations in leased access. Minorities should be charged the minimum leased access rate available and given first priority on available channels").

[34]Comments of the Game Show Network, at 30.

[35]Id. at 30.

system."[36] In addition, Commentors agree with the Community Broadcasters Association point that Congress has provided separately for not-for-profit programmers to reach the public through Public, Educational, and Governmental ("PEG") channels.[37]

Moreover, after the Supreme Court's decision in Adarand v. Pena, it is doubtful that such a measure would pass constitutional strict scrutiny.[38] In Adarand, the Supreme Court ended the practice of holding congressionally mandated "benign" racial classifications to intermediate scrutiny.[39] The Supreme Court held "that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."[40] Commentors suggest that a discriminatory pricing scheme based on the possibility that some of the lessees might add racial diversity or might appeal to minority audiences would not survive strict scrutiny. Assuming arguendo that such a provision could pass strict scrutiny review, the concept would still blatantly violate Congress' dictate that the Commission should determine maximum reasonable rates and the Commission should ensure that the rates "will not adversely affect the operation, financial condition, or market development of the cable system."[41]

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[36]Communications Act, § 612(c)(1), 47 U.S.C. § 532(c)(1).

[37]Comments of the Community Broadcasters Association, at 11.

[38]Adarand Constructors v. Pena, 115 S.Ct. 2097 (1995).

[39]Id., at 2112.

[40]Id., at 2113.

[41]Communications Act, § 612(c)(1)(4), 47 U.S.C. § 532(c)(1)(4).

C. Tier and Channel Placement

Although several commentors believe that lessees should be carried on the basic service tier and that cable operators should not be allowed to change the channel position without the lessee's permission,[42] or until the lessee relinquishes the channel,[43] Commentors support the continuation of allowing cable operator discretion as to what channels to designate and on what tiers these channels should be located. Cable operators will want to provide tiers which do not include repetitive channels. Allowing cable operators to designate the channels and tiers for lessees will help maintain the quality of the cable system by reducing repetitiveness within tiers and increasing the diversity of programming provided to audiences.

D. Selection of Programmers

The NPRM proposes a bifurcated process for selecting programmers. First, the NPRM proposes to use a first-come, first-serve approach instead of giving the cable operator discretion to select among leased access applicants. Then, the NPRM proposes to allow the cable operator to select among applicants if its set-aside capacity is insufficient to accommodate all pending leased access requests. Some independent programmers support the first-come, first-serve approach.[44] Other commentors argue that cable operators should be forced to select first from local leased access program producers if more leased access

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[42]Comments of The Vacation Channel, at 4; comments of the Beach Channel, at 2-3.

[43]Comments of The Vacation Channel, at 4.

[44]See Comments of Asiavision, Inc., at 1.

programmers are competing for capacity after the set-aside is filled.[45] Commentors submit that cable operators should have complete discretion to select among leased access applicants in order to select the programming which would be most compatible with the services already being provided. Commentors support the NPRM approach which allows the cable operator to select among applicants. Commentors believe that allowing cable operators discretion in selecting among leased access applicants is consistent with Section 612(c) of the Act.[46] Allowing cable operators to select the programmers gives operators a modicum of control over the mix of services on their tiers and allows cable operators to provide a diverse selection on the tiers.[47]

E. Resale of Leased Access Time

The NPRM asks whether leased access time should be permitted to be resold by a channel lessee. Visual Media Productions opposes any rules allowing commercial leased access programmers, including non-profit programmers, from reselling their contracted time.[48] Commentors agree with their opinion that this would "encourage insincere programmers to grab-up prime-time in hopes of making speculative profit by reselling."[49]

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[45]Comments of VIPNA, at 8.

[46]Section 612(c) allows cable operators to discriminate among lessees as to rates based on programming content.

[47]For instance, allowing cable operators to select programming would reduce the odds that there would be two horse racing channels on one tier. The cable operators' selection would allow for a different type of programmer to fill the second channel and improve the diversity of the tier.

[48]Comments of Visual Media Productions, at 10.

[49]Id.

Indeed, insofar as there was a demand for resale of leased time, this demand would be strong evidence that the Commission's rate formula was far below the marketplace. Commentors also agree with Visual Media Productions that allowing resale would further complicate administration of the rules.[50] The Commission would be unable to ensure that rates were reasonable for resale, and the cable operator could not exercise its discretion to block indecent programming if resale is allowed. Therefore, Commentors submit that the Commission should not permit leased access time to be resold by the lessee. At a minimum, the Commission should allow cable operators to decline to lease time for resale.

CONCLUSION

Congress clearly delineated their intention in Section 612 to make available leased access channels at rates which would not adversely affect a cable operator's financial condition or market development. In doing so, Congress granted the Commission the authority to set the maximum reasonable rates that a cable operator could charge. The Commission, in interpreting Congress' mandate, specifically stated that leased access channels should not be subsidized. Commentors are willing to accommodate lessees on their set-aside channels, but these lessees must pay a reasonable rate. The Commission should not adversely affect cable operators by requiring them to subsidize the addition of LPTV, non-profit, or independent programmers. The Commission also should refrain from offering preferences or subsets of set-asides for minorities and/or non-profits. Such favoritism undermines the Commission's stated intention not to subsidize certain programming. Cable

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[50] Id.

operators want diversity on their channels because it increases the overall value of their systems in an increasingly competitive video programming market. The Commission should not mandatorily take away the market value of their channels when the marketplace is producing the diversity that Congress demanded.

Respectfully submitted,

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